Supreme Court, U.S.
FILED
SEP 23 1971
E. ROBERT SEAVER, CLERK

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

No. 71-415

COLORADO RIVER WATER CONSERVATION DISTRICT,
Petitioner,

v.

ROCKY MOUNTAIN POWER COMPANY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

KENNETH BALCOMB
Delaney & Balcomb
P.O. Drawer 790
Glenwood Springs, Colorado 81601

ROBERT L. McCARTY
McCarty & Noone
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for Petitioner

September 22, 1971

Washington, D.C. THIEL PRESS 202 393-0625

INDEX

	Page
CITATION TO OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT	10
CONCLUSION	23
APPENDICES	
A. Opinion Below	A-1-7
B. Statutes Involved	B-1-4
C. Cliffs Divide Report, p. 104	C-1-2
Yampa-White Report, pp. 65-75	C-2-17
D. District Assignment of Curecanti Rights to U.S.	D-1-3
E. U.S.B.R. letters to District; September 17, 1971; August 10, 1967; October 23, 1967; January 31, 1968	E-1-9
F. Letter August 31, 1971 re protest in District Court, Routt County on District claim for Hayden Mesa Project	F-1-2

CITATIONS

CASES:

Denver v. Northern Colo. Water Conservancy District, 130 Colo. 375, 276 P.2d 992 (1955)	19
Four Counties Water Users Ass'n. v. Colorado River Water Conservation District and Middle Park Water Conservancy District, 414 P.2d 478 (Colo. 1966)	13
Four Counties Water Users Ass'n. v. Colorado River Water Conservation District and Town of Steamboat Springs, 414 P.2d 469 (Colo. 1966)	13
Four Counties Water Users Ass'n. v. Colorado River Water Conservation District, 161 Colo. 416, 425 P.2d 259, *cert. denied*, 389 U.S. 1049, *reh. denied*, 390 U.S. 976 (1968)	3, 4, 5, 10, 11, 13, 14, 15, 17, 18, 19, 20

Page

Four Counties Water Users Ass'n. v. Middle Park Water Conservancy District, et al., 161 Colo. 429, 425 P.2d 262, *cert. denied*, 389 U.S. 1049, *reh. denied*, 390 U.S. 976 (1968) 3, 4, 5, 10, 11, 13, 14, 15, 17, 18, 19, 20

Fruitland Irrigation Co. v. Kruemling, 62 Colo. 160, 162 P. 161 (1917) 12

In re Rocky Mountain Power Co., 37 F.P.C. 329 (1967), *aff'd on rehearing*, 37 F.P.C. 900 (1967), *aff'd*, Rocky Mountain Power Co. v. F.P.C., et al., 409 F.2d 1122 (D.C. Cir. 1967) 9

Metropolitan Suburban Water Users Ass'n. v. Colorado River Water Conservation District, 148 Colo. 173, 365 P.2d 273 (1961) 13, 16

Rocky Mountain Power Co. v. F.P.C., et al., 409 F.2d 1122 (D.C. Cir. 1967) 9

Rocky Mountain Power Co. v. White River Electric Ass'n., 151 Colo. 45, 376 P.2d 158 (1962) 12

Taussig v. Moffatt Tunnel Water and Development Co., 106 Colo. 384, 106 P.2d 363 (1940) 12

United States v. District Court in and for the County of Eagle, et al., 401 U.S. 520 (1971) 3, 6, 18

United States v. District Court in and for Water Division No. 5, et al., 401 U.S. 527 (1971) 3, 6, 18

STATUTES:

Boulder Canyon Project Adjustment Act of 1940, 54 Stat. 774 as amended
§ 2, 43 U.S.C. § 618a 2, 6

Boulder Canyon Project Act of 1928, 45 Stat. 1057 as amended
§ 15, 43 U.S.C. § 617 n. 2, 6

Colorado River Storage Project Act of 1956, 70 Stat. 105 as amended
§ 1, 43 U.S.C. § 620 ..... 2, 7, 16
§ 2, 43 U.S.C. § 620a 2, 4, 15, 16, 19, 20
§ 3, 43 U.S.C. § 620b 2, 4

Colo. Rev. Stat. 1963
§§ 150-7-1 to 7-32, as amended 4

Page

Colorado River Basin Act of 1968, 82 Stat. 885
§ 501 ..... 10, 20

COMPACT:

Upper Colorado River Basin Compact of 1948, approved by Congress in the Act of April 6, 1949, 63 Stat. 31, Article IX(a) 2, 17

CONGRESSIONAL MATERIAL:

H.R. Doc. No. 419, 80th Cong. 1st Sess. (1947), *The Colorado River: Interim Report on the Status of Investigations Authorized to be Made by the Boulder Canyon Project Act and the Boulder Canyon Project Adjustment Act* 6

H.R. Doc. No. 107, 88th Cong. 1st Sess. (1963), *Fruitland Mesa Project, Colorado*, p. 28 19

DEPARTMENTAL REPORTS:

Public Land Law Review Commission, *One Third of the Nation's Land: A Report to the President and the Congress* (1970) 21

U. S. Department of the Interior, *The Colorado River: A Comprehensive Report on the Development of the Water Resources of the Colorado River Basin* (1946), reprinted with transmittals to the Congress as H.R. Doc. 419, 80th Cong. 1st Sess. 1947 6

U. S. Department of the Interior, *Colorado River Storage Project and Participating Projects, 14th Annual Report* (1970) 22

U. S. Department of the Interior, Bureau of Reclamation, *Cliffs Divide Project, Colorado, Status Report* (1954) 6, 7

U. S. Department of the Interior, Bureau of Reclamation, *Yampa-White Project, Colorado, Utah and Wyoming, Reconnaissance Report* (1957) 6, 8, 9, 11

Colorado River Water Conservation District, *Stage Development Plan for Supplying Municipal and Industrial Water for the Potential Oil Shale Industry in Western Colorado* (1958) 9

Page

Colorado River Water Conservation District, *Quality of Colorado River Water for Supplying the Municipal and Industrial Needs in the Rifle-De Beque Oil Shale Area* (1959) . . . 9

IN THE

SUPREME COURT OF THE UNITED STATES

No.

COLORADO RIVER WATER CONSERVATION DISTRICT,
Petitioner,

v.

ROCKY MOUNTAIN POWER COMPANY, *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

Petitioner Colorado River Water Conservation District respectfully prays that a writ of certiorari issue to review a judgment of the Supreme Court of Colorado entered April 19, 1971.

OPINION BELOW

The opinion of the Supreme Court of Colorado has been reported at 486 P.2d 438 and is reprinted herein as Appendix A.

JURISDICTION

The judgment in this case was entered on April 19, 1971. A timely petition for rehearing was denied on May 24, 1971. Upon application timely filed, Mr. Justice White extended the time for filing this petition to and including September 22, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether a State court in a water rights adjudication may properly reject work done by the U. S. Bureau of Reclamation as insufficient to establish a priority date for water rights for a federal project when lesser work by non-federal interests was found sufficient to support a prior date for their project?

2. Whether the federal plan for comprehensive development of the Upper Basin of the Colorado River, when coupled with field work and other investigation activity by the Bureau of Reclamation as essential steps toward authorization of particular federal reclamation projects contemplated by an Act of Congress, establish a federal intent to appropriate water and to apply it to beneficial use?[1]

STATUTES INVOLVED

The statutory provisions involved are Section 15 of the Boulder Canyon Project Act of 1928, 45 Stat. 1057, 1065, 43 U.S.C. § 617n; Section 2 of the Boulder Canyon Project Adjustment Act of 1940, 54 Stat. 774, *as amended*, 43 U.S.C. § 618a; Sections 1, 2 and 3 of the Colorado River Storage Project Act of 1956, 70 Stat. 105, *as amended*, 43 U.S.C. § 620, 620a, and 620b, respectively. Their pertinent text is reprinted in Appendix B hereto.

---

[1] If this petition is granted, petitioners reserve the right to argue the additional related questions of whether the decision violates Article IX(a) of the Upper Colorado River Basin Compact of 1948; whether the State of Colorado has bound itself to grant water rights sufficient for reclamation projects constructed under the Colorado River Storage Project Act; and the possible question of deprivation of vested rights arising by way of court decisions, reservations, or otherwise.

STATEMENT

Introduction

This case stems from a water rights adjudication in the Colorado courts of the kind treated by this Court last spring in its *Eagle County* opinion.[2] Subsequent to that decision the Supreme Court of Colorado issued the opinion on which review is now sought, holding that survey work and other activity by the U. S. Bureau of Reclamation put into evidence by the District through Bureau personnel, was insufficient to establish a priority date for a federal project senior to a date granted the respondent[3] for a non-federal undertaking having a reservoir site common to the Bureau proposal.

Review of the question thus presented was denied by this Court several years ago in the *Four Counties* cases.[4] While the United States was not a party there it responded *amicus* to inquiry from this Court that the basis of those decisions was "unsound and prejudicial to the United States" and that the denial of the priority sought was "an impermissible discrimination against claimants relying on Bureau of Reclamation actions".[5] Now, under *Eagle County* and *Darrow*, if the United States is properly served in an adjudication, claims of the sort rejected below must be advanced by it, together with any other water claims, if they are to be accorded any priority dates at all. If the ruling below is allowed to stand

---

[2] Decided March 24, 1971, U.S. v. Dist. Court in and for the County of Eagle, et al., 401 U.S. 520 (1971). The companion case, referred to hereinafter as *Darrow*, is U.S. v. Dist. Court in and for Water Division No. 5, et al., 401 U.S. 527 (1971).

[3] Rocky Mountain Power Company.

[4] Four Counties Water Users Ass'n. v. Colo. R. Water Conservation Dist., 161 Colo. 416, 425 P.2d 259, and Four Counties Water Users Ass'n. v. Middle Park Water Conservancy Dist., et al., 161 Colo. 429, 425 P.2d 262, *cert. denied*, 389 U.S. 1049, *reh. denied*, 390 U.S. 976 (1968).

[5] Memorandum *Amicus* by the United States in No. 498, Oct. Term 1967 at 3.

it is clear the United States will not get its proper date in the Colorado courts and may in any event be precluded from readjudicating these rights on the basis that the United States was effectively present in this proceeding through the participation of the District in its full development of the federal claim. A challenge to water rights for another federal project, based on the ruling below, has recently been made[6] and more may be anticipated. The impact on federal water rights and thus on federal water programs could be severe. The problem, we submit, needs to be reviewed now.[7]

How the Federal Questions Were Raised

The Petitioner Colorado River Water Conservation District (District)[8] filed a claim in a Colorado District Court to establish water rights essential to the fulfillment of the Flattops Project, a project within the contemplation of Section 3 of the Colorado River Storage Project Act of 1956,[9] for ultimate

---

[6] This action in the District Court for Routt County involves the Hayden Mesa Project, which will be further referred to in this Petition because it is a project authorized by Congress for priority of planning in 1968 amendments to the Colorado River Storage Project Act. See Section 2 of that Act, as amended, set forth in Appendix B hereto.

[7] Because the problem in the *Four Counties* cases is identical a petition for rehearing out-of-time is being filed in those cases concurrently with this petition for certiorari. In addition, other intervening circumstances which we believe warrant rehearing out-of-time are set forth in that petition.

[8] The District is a public agency of Colorado created by statute in 1937 (Colo. Rev. Stat. 1963, §150-7-1 to 7-32, *as amended*). The District comprises all of twelve and parts of three counties in western Colorado and includes within its geographic area the Gunnison River, and the Colorado portions of the Yampa, White and Colorado Rivers. The statute empowers the district to ". . . initiate [water] appropriations for the use of the ultimate appropriators . . .". and to do what is necessary ". . . to secure an adequate supply of water, present and future, for irrigation, mining, manufacturing and domestic purposes within [the District]." (§150-7-5(3)).

[9] 70 Stat. 105, *as amended*, 43 U.S.C. §620b, set forth in Appendix B hereto. This Act is hereinafter referred to as the Storage Project Act.

construction by the government as a participating project. Rather than providing irrigation water, this project was planned by the Bureau of Reclamation to provide industrial and municipal water supplies for prospective oil shale development as well as hydroelectric power for such development within the District area (R. 1144, 1145).[10]

The proof accompanying the request for water rights for this project included the Bureau's report thereon (see Appendix C hereto), the testimony of federal employees (R. 1357, R. 2025), and established that the priority date claimed was based on field survey work commenced by the Bureau on June 28, 1954 (R. 1211, 1219). Instead of that date, however, the trial court awarded the District the date of October 31, 1961 (R. 206); and awarded to the Respondent, Rocky Mountain Power Company (Power Company) its claimed date of September 7, 1957 (R. 171) for a project on the same site (R. 1199). The District filed objections and exceptions (R. 155-158) but these were overruled (R. 159, 162).

On writ of error the District showed its cooperation over the years with the Bureau and its role of seeking water rights to implement the federal projects studied (brief below, pp. 17-19). However, the court below affirmed and while recognizing that the projects were mutually exclusive, nevertheless concluded, in line with its rulings in the *Four Counties* cases:

1. The initiation of a survey by the Bureau of Reclamation for a potential federal water project is insufficient evidence of an intention to appropriate water.

2. There is no sufficient privity or connection between the United States and the District permitting the use by the District of work performed by the United States.

3. The rights here involved cannot be attributed to a "federal reservation of waters."

In its petition for rehearing below, filed on May 14, 1971, the District made specific reference to the decisions of this

---

[10]The references are to the record as prepared on writ of error for the court below.

Court in *Eagle County* and *Darrow* and to the expressed concern of the United States that its claims would not adequately be recognized in State proceedings (Pet. Reh. below, pp. 3-4). This petition was, however, denied, without further opinion.

Background of the Litigation

In 1947 Congress published a report by the Secretary of the Interior presenting an "inventory of potential water resources developments in the Colorado River Basin."[11] The studies and investigations on which this report was based had been authorized by the Boulder Canyon Project legislation,[12] and as the report itself made clear, the studies were to continue in order to formulate a "comprehensive scheme" as directed by Congress.

In furtherance thereof, the Bureau of Reclamation conducted investigations over the 1949-1953 period along the main stem of the Colorado River above its confluence with the Gunnison River, culminating in a report dated February 16, 1954, which first identified the Flattops Project.[13] Field surveys of this project began shortly afterward and a report on it, as a unit of the Yampa-White Project, was issued by the Bureau in 1957.[14] It was upon this background

---

[11]H.R. Doc. No. 419, 80th Cong., 1st Sess. (1947), *The Colorado River: Interim Report on the Status of Investigations Authorized to be Made by the Boulder Canyon Project Act and the Boulder Canyon Project Adjustment Act*, at 1.

[12]See Section 15, Boulder Canyon Project Act of 1928, 45 Stat. 1057, 1065, 43 U.S.C. §617n; and Section 2, Boulder Canyon Project Adjustment Act of 1940, 54 Stat. 774; 43 U.S.C. §618a. Both sections are reproduced in Appendix C hereto.

[13]U.S. Department of the Interior, Bureau of Reclamation, *Cliffs Divide Project, Colorado, Status Report* (1954). Page 104 of this report, set forth in Appendix C hereto, sketches the possibilities of a "White-Colorado Diversion," which upon further investigation was named Flattops.

[14]U.S. Department of the Interior, Bureau of Reclamation, *Yampa-White Project, Colorado, Utah and Wyoming, Reconnaissance Report* (1957), pp. 65-75, reproduced herein in Appendix C.

of authorized project investigation activity by the Bureau of Reclamation, contemporaneous with Congressional consideration of the Storage Project Act, that the District made its filing in order to secure the conditional water rights which would be essential if the project were ever to be authorized for construction by the Congress. At that time it was customary for a local organization such as the District to obtain such water rights and thereafter to assign them to the United States for use in the development and operation of particular projects.[15]

Flattops Project

In the trial court the District established that the Flattops Project was first contemplated as a consequence of work commenced by Philip P. Smith, a graduate engineer employed by the Bureau of Reclamation, as part of the study which resulted in the *Cliffs Divide Report* (R. 1152). This study, including field investigations and surveys, took place over the 1949-1953 period. The report thereon, published in 1954, took note of what became known as the Flattops Project, appearing then as the White-Colorado Diversion[16] (R. 1169, 1189-90). The report noted the possibilities of the storage of water at the Rio Blanco Reservoir site[17] and diversion to the Colorado River Valley to develop both water and power for municipal and industrial use in this area of potential ". . . substantial oil shale development."

The Flattops Project was thus identified and designated for more detailed consideration by the Bureau in connection with the Yampa-White study, by a team again headed by

[15] An example of such an assignment by the District is shown in Appendix D hereto. This relates to the Curecanti Project, one of the four initial units of the Storage Project Act.

[16] See Appendix C-1 hereto for a reprint of this portion of the *Cliffs Divide Report*, p. 104.

[17] The Rio Blanco Reservoir is called the Buck Creek Reservoir in the *Cliffs Divide Report*. This same reservoir site is called Meadows Reservoir by the Power Company (R. 1421).

Philip P. Smith of the Bureau[18] (R. 1191). This study began in 1953 and ended in 1956, with the report thereon being published in February, 1957 (R. 1202). This report identified the project as the Flattops Unit, for the "primary purpose [of supplying] municipal and industrial water for pending oil shale and industrial development along the Colorado River in the vicinity of the Colorado towns of Rifle, Grand Valley and DeBeque." The project was proposed for development in six stages, as needs for water and power grew, to provide 128,000 acre feet of water as well as 221,300,000 kwh of saleable energy annually.[19]

Investigations for this study were made by survey parties consisting of transit men, plane table men, rod men, recorders and a geologist (R. 1196-97). These survey parties went into the field and identified reservoir sites, inspected foundations and made topographic maps (R. 1194-96). It was the work sheet report of Herschel D. Westermire, chief of one of the Bureau's survey parties, that was used as evidence of the date of appropriation claimed by the District, that is, June 28, 1954 (R. 2040). It was on this date that the actual field survey of the Flattops Project began (R. 2040). Beyond field work of this type, hydrologic studies were made, cost estimates were prepared and an economic analysis was accomplished. In sum, the work done was recognized in the *Yampa-White Report* as providing the basis for a finding that the project, at each of the six stages, "provides an economically feasible development" (App. C-14). In addition, Mr. Smith testified that development of the project was feasible (R. 1331-34).

---

[18]Philip P. Smith resigned from the Bureau of Reclamation in March, 1956 (R. 1202), to take a job with the District, but on request of the Bureau of Reclamation and without compensation from the Bureau he assisted in completion and publication of the *Yampa-White Report* (R. 1194, 1523-24).

[19]The Bureau of Reclamation advised in 1967 that $31,782 had been spent on Flattops studies. Estimated project costs as of 1957, for all six stages, were $62,300,000.

After the Bureau's report on the Flattops Project the District prepared and published two reports on water supply for the oil shale industry, one in 1958 and the other in 1959,[20] both of which dealt with the need for Flattops in providing water for oil shale development (R. 1224, 1250). The actual filing of the claim for the project was fully in accord with the District policy of securing water rights for projects in the District's area which were within the contemplation of the Storage Project Act and of assigning those decrees to the United States for project implementation (R. 1351-54). Despite this history, the date awarded the District was October 31, 1961, the date the District Board discussed the filing of the claim.

In contrast, the priority date of September 7, 1957 claimed by and awarded to the Power Company was based on the claim that a Mr. Marvin J. Greer, then an employee of the Bureau but on his own time, made a survey with another engineer of the proposed Rio Blanco Reservoir area, the same site proposed for the Meadows Reservoir by the Power Company. This survey consisted of a seven hour investigation of the area's geology and staking of the proposed reservoir as a unit of the Power Company's proposed Sweetwater Project[21] (R. 316-21).

Mr. Greer later joined the Power Company as its chief engineer. As he stated, he was, of course, as a Bureau employee, familiar at the time of his survey with the *Yampa-White Report* (R. 307).

---

[20]Stage Development Plan for Supplying Municipal and Industrial Water for the Potential Oil Shale Industry in Western Colorado (1958); Quality of Colorado River Water for Supplying The Municipal and Industrial Needs in the Rifle-De Beque Oil Shale Area (1959).

[21]The Power Company's Sweetwater Project is substantially the same as that brought before the Federal Power Commission on an application for a license which was dismissed by the Commission. *In re* Rocky Mountain Power Co., 37 F.P.C. 329 (1967); *affirmed on rehearing*, 37 F.P.C. 900 (1967); *affirmed*, Rocky Mountain Power Co. v. Federal Power Commission, et al, 409 F.2d 1122 (D.C. Cir. 1967).

From the foregoing it is evident that the District has been denied a water right essential to a potentially important federal water project, based on federal work and federal expenditures, while a prior water right has been awarded to a private entrepreneur for less extensive work done three years later by a Bureau employee on his own time after reading reports of the Bureau's work, and who later joined the Power Company asserting that priority in its behalf.

REASONS FOR GRANTING THE WRIT

I.

THE SUPREME COURT OF COLORADO HAS AGAIN ASSERTED A DUAL STANDARD FOR THE ACQUISITION OF WATER RIGHTS WHICH DISCRIMINATES AGAINST CLAIMANTS RELYING ON FEDERAL ACTIONS AND IS PREJUDICIAL TO THE UNITED STATES

The holdings below again raise the issue of whether a state court may properly reject work done by the United States Bureau of Reclamation as insufficient to establish a priority date for a conditional right to water for a project when this work would have been sufficient if done by someone other than an agency of the United States. This was an effect of the 1967 holdings of the Colorado Supreme Court in the *Four Counties* cases.[22]

In the instant case the court below said (App. A-6):

> Even if by some stretch of the legal imagination, the Conservation District could attribute the work done in 1954 to itself, we find that the case of *Four*

[22] *Supra*, n. 4. In those cases the District sought priority dates for four federal irrigation projects, two of which (Rabbit Ear and Troublesome) were at that time specifically named and given priority for completion of planning reports in Section 2 of the Storage Project Act. Since then Congress had added the other two projects (Wessels and Toponas) to Section 2 through Section 501 of the Colorado River Basin Act of 1968, Act of Sept. 30, 1968, 82 Stat. 885, 43 U.S.C. § 1501, hereinafter the Basin Act.

> *Counties Water Users Ass'n. v. Colo. River Water Conservation Dist.* [425 P.2d 259], is directly in point. In that case, a claim by the District based on the same "Yampa White Basin Report" was held by this court to be invalid because the work in making the Report was insufficient to constitute a "first step" toward perfecting an appropriation.

The court thus reaffirmed its finding in *Four Counties*, that the actions taken by the Bureau were insufficient to establish the "first step". Also, the court held in the alternative that even if such actions might be considered to be sufficient, the requisite contemporaneous intent of the District was not shown to exist until October 1961.

Such findings discriminate against claimants relying on activity of the United States, as was emphatically pointed out by the Solicitor General in responding to a request of this Court for an expression of views in the *Four Counties* case:

> . . . The Colorado Supreme Court did not reach the question whether [surveys and other Bureau actions] inured to the benefit of the petitioners, since it held that the requisite intent was lacking. Although the ultimate issue in these cases is the priority date of appropriative rights under state law, the present rulings appear to have turned on the State Supreme Court's view of the limited authority of Bureau of Reclamation employees and the fact that further steps on the contemplated federal project depend upon congressional authorizations and appropriations.
>
> *This ground of decision is, in our view, unsound and prejudicial to the United States.* Indeed, it appears that the physical actions here taken, if performed by agents of a non-federal irrigation district, would have been sufficient to establish priority. We do not understand that, for nonfederal appropriations, priority is held to hinge on the degree to which particular officers or employees may speak for or bind corporate directors or stockholders. Yet, here,

> priority rights were denied because of internal requirements of the federal government concerning detailed approval of planning and appropriation of funds *This is, we submit, an impermissible discrimination against claimants relying on Bureau of Reclamation actions.* [emphasis added][23]

The foregoing applies with perhaps even greater emphasis to the instant decision. For in its holdings the court below passes by work initiated by a Bureau team in the field and fully reported upon in a published work to give preference to later activity engaged in by a person familiar with the work and who was still at the time in the Bureau's employ. The result was to prefer the Power Company's so-called Sweetwater Hydroelectric Project over the Bureau's Flattops Project, for as the court below noted, the diversion concept of Flattops was embodied as well in the Sweetwater proposal "and the existence of either project apparently would preclude the feasibility of the other project." (App. A-5) In these circumstances, the "impermissible discrimination" is glaring indeed and should be corrected.

Under Colorado law a right to appropriate water relates back to the time the first open step is taken thus giving notice of intent to secure it.[24] Furthermore, the initiation of a survey, as in this case, has been held to constitute a first step sufficient to acquire a priority for a water right, *as of the date the survey commenced.* This proposition has been crystal clear at least since 1940 when in *Taussig v. Moffatt Tunnel Water and Development Co.*, 106 Colo. 384, 391, 106 P. 2d 363, 367, the court said:

> . . . The first step taken in the instant case toward acquiring decrees was the making of a survey of the project, which is not an unusual practice. . .

---

[23] Memorandum for the United States as Amicus Curiae, at 2-3, in No. 498, Oct. Term, 1967.

[24] Rocky Mountain Power Co. v. White River Electric Ass'n., 151 Colo. 45, 376 P.2d 158 (1962); Fruitland Irrigation Co. v. Kruemling, 62 Colo. 160, 162 P. 161, 163 (1917).

Surveys were again held to be the first step in the approval of a conditional decree in *Metropolitan Suburban Water Users Ass'n. v. Colorado River Water Conservation District*, 148 Colo. 173, 365 P. 2d 273 (1961), where the court pointed strongly to the fact that only a conditional decree was sought which could be modified as might be necessary in the future, saying (at 194):

> . . . Assurance of a decree on completion of a project is a prerequisite to complete financing, engineering and construction . . .

and (at 194)

> . . . Only time can definitely determine whether all, a part, or none of the claimed water is needed. Time and work will demonstrate whether the engineering and construction plans are *feasible* and can be successfully completed. Time will tell whether finances can be made available . . . (emphasis added)

These cases and others are discussed by the court in *Four Counties Water Users Ass'n. v. Colorado River Water Conservation District and Town of Steamboat Springs*, 414 P. 2d 469 (1966), and *Four Counties Water Users Ass'n. v. Colorado River Water Conservation District and Middle Park Water Conservancy District*, 414 P. 2d 478 (1966).[25] In these cases conditional decrees were awarded based on surveys far less extensive than those conducted by the Bureau of Reclamation for the Flattops Project.

To buttress its holding against the Bureau date, the court below said (App. A-6):

---

[25] Not to be confused with the *Four Counties* cases to which we have already referred, these companion cases are the two *Four Counties* cases which awarded conditional decrees to the projects there contemplated by the claimant, Four Counties. The two *Four Counties* cases involved in the Solicitor General's memorandum were those in which the Colorado Supreme Court sustained Four Counties' attack on the conditional decrees which had been awarded the District in the trial court, based on Reclamation Bureau survey dates.

> . . . The United States Government asserts no claim in the adjudication and no privity is shown to exist between the Conservation District and the United States. . . .

But this finding of lack of privity should be compared with the following statement of the Solicitor General in his memorandum *amicus* (at 2) in *Four Counties*:

> Since the inception of the federal reclamation program, the policy has been to execute the purpose in cooperation with local authorities and, in many details, through the medium of local irrigation districts or similar organizations. Frequently such districts secure the necessary water rights, obtain adjudication of their validity, and assign them to the United States. . . .

That such a relationship existed between the United States and the District was fully demonstrated below.[26] The court below nevertheless clearly misapprehended this relationship.

There thus appears to be a dual standard under the Colorado decisions which in the language of the Solicitor General is "prejudicial to the United States." This is an intolerable burden not only upon the Government, which is thereby disadvantaged in the competition for water in areas of short supply, but upon those claiming under it, like the District, as representative of the beneficiaries of the Bureau of Reclamation's programs.

---

[26] See also e.g. the assignment in Appendix D hereto.

II

THE INTENT TO APPROPRIATE WATER IS MANIFEST FROM THE BACKGROUND AND SCOPE OF PLANNING FOR THE FEDERAL DEVELOPMENT OF THE UPPER BASIN OF THE COLORADO RIVER

The opinion below is based on the opinions in the *Four Counties* cases, including the following conclusion on the intent of the United States, taken from the case involving the Rabbit Ear and Troublesome Projects[27] (425 P.2d 262, at 264):

> . . . We conclude that although the interest of the United States in the development of the project might be argued to have become more definite, it still lacked the fixed purpose and intent to effect a diversion of water that would be required to initiate an actual appropriation under Colorado water law.

After setting forth testimony by a Reclamation Bureau witness as to the reports necessary prior to authorization for *construction* of a project by Congress, the court further held (*Id.*):

> It is clear from the above that the United States at no time had made a determination to pursue the Rabbit Ears Project with a definite intent to actually go ahead with the same and thereby appropriate the waters of this state. . . .[28]

---

[27] Both specifically named for priority of completion of planning reports in Section 2 of the Storage Project Act.

[28] Comparable statements on federal intent from the *Four Counties* opinion involving the Wessels and Toponas Projects (425 P.2d 259) are:

> We find from the facts hereinafter set forth and from the law applicable thereto, there was not an appropriation by either the District or the Bureau of Reclamation as of the priority dates granted to the District. (*Id.* at 260)

and:

> We find from the description of the work done by the Bureau of Reclamation in the reports previously alluded to that there was no intent to take water and no physical

In basing its opinion in *Flattops* on the foregoing the court below again ignores the extensive history of federal activity which led to the establishment of a comprehensive plan for developing the water resources of the Upper Basin States embodied in the Storage Project Act, as well as numerous amendments to that Act since then. This entire range of federal activity must be considered in determining the intent of the United States and when coupled with the specific actions of the Bureau in connection with the Flattops Project, the error of the court below becomes readily apparent.

But the decision below erroneously continues to emphasize the view that the Bureau's work was only on potential[29] development and thus apparently could not establish the requisite contemporaneous intent to secure a priority date for a conditional decree. In this regard the court below simply misapprehended the significance of the work done by the Bureau. This work represents the last federal step leading to the acquisition of water rights for the projects, since under existing procedure these rights are conditionally established before the expensive final feasibility investigations are commenced.[30]

---

demonstration from which such intent could be inferred so as to constitute the initial step in an appropriation.

It should be observed here that Congress in amending the Storage Project Act in 1968 specifically included Wessels and Toponas in Section 2 of the Act for priority of completion of planning reports.

[29] The court underscores *potential* each time the word is used (App. A) except when referring to "potential oil shale development". That any reliance on the use of the word potential is misplaced, note that while the Bureau report on the Flattops Unit characterizes it as a "potential" transbasin diversion, it also makes reference to the Curecanti Unit as "potential," despite the fact that Curecanti had been authorized by Congress a year earlier in Section 1 of the Storage Project Act. The detail in the study and planning of Flattops is evident in the extract from the Bureau report in Appendix C hereto.

[30] The necessity for conditional decrees prior to the time work of this magnitude is undertaken was discussed by the Supreme Court of Colorado in Metropolitan Suburban Water Users Ass'n. v. Colorado

The Colorado court's implication that the United States can intend to construct a project only if Congress has either actually authorized a particular project for construction or specifically appropriated funds for final planning misconceives the relationship between the Congress and the Department of the Interior in carrying out the reclamation program. Congress has delegated the responsibility for planning federal projects to the Secretary of the Interior. Congress funds the investigations of potential reclamation projects and authorizes their construction, if *feasible*, once the planning is completed by the Secretary. In ascertaining the intent of the United States, the totality of federal activity—executive and legislative—must be considered. The lower court ignored the Congressional direction that comprehensive development be planned and refused to give credence to that end to the Bureau investigation and planning for Flattops. In so doing it erroneously decided a federal question of substantial importance.[31]

River Water Conservation Dist., 148 Colo. 173, 194, 365 P.2d 273, 284-85 (1961):

> It is inconceivable that any development of the magnitude of that proposed by the Association involving the expenditure of more than $33,000,000 over a period of five or more years can be completed without the aid of the conditional decree statutes. Assurance of a decree on completion of a project is a prerequisite to complete financing, engineering and construction. The conditional decree statute is designed to meet the very problems confronting the Association, and it should be construed and applied so as to aid and encourage, rather than to block development and early use of the water resources of the state.

[31] Article IX(a) of the Upper Colorado River Basin Compact of 1948, approved by Congress, 63 Stat. 31 (1949), recognizes the right of the United States to acquire rights to the use of water in the signatory states without limitation. This and the *Four Counties* decisions place a severe and unreasonable restriction upon the United States in the acquisition of water rights in Colorado.

III.

WATER RIGHTS FOR FLATTOPS AND FOR OTHER FEDERAL UNDERTAKINGS BASED ON FEDERAL SURVEYS, EVEN IF ADVANCED BY THE UNITED STATES UNDER THIS COURT'S HOLDINGS IN *EAGLE COUNTY* AND *DARROW*, WILL NOT BE ACCORDED RECOGNITION UNDER THE RULING BELOW. THE UNITED STATES MAY IN ANY EVENT BE CONSTRUCTIVELY BOUND

Whatever doubt may have existed in 1967 when certiorari was sought in the *Four Counties* cases, it is now clear as a consequence of the recent decisions of this Court in the *Eagle County* and *Darrow* cases[32] that the United States must appear in state water adjudication proceedings and assert all of its claims to the use of water. Thus, if the *Four Counties* and the *Flattops* cases were just now commencing and the United States were served in the proceedings, the United States itself, rather than the District, as trustee for the beneficiaries, would be expected to make the claims for the projects involved and would of course be expected to claim the date of the commencement of the Bureau surveys. However, it could clearly fare no better than the District in the trial courts, which would be bound to follow the decisions of the Colorado Supreme Court. Nor, indeed, could the Government expect any different result in that latter court. That court's attention was directed to *Eagle County* and *Darrow* in the petition for rehearing below. Rehearing was denied without additional comment. Consequently, the United States, when making claim for this and other projects similarly in dispute, faces years of fruitless litigation to reach this Court in any attempt to obtain its true priority dates.

[32] United States v. District Court in and for the County of Eagle, et al., 401 U.S. 520 (1971); United States v. District Court in and for Water Division No. 5 et al., 401 U.S. 527 (1971).

But beyond this, the United States may well be constructively bound by the actions of the District in attempting adjudication of these Federal water rights.[33] The District has been appearing in these water adjudications for many years in effect as trustee for the people of its area, and has presented the work product of Federal employees, placing them before the courts for testimony on their work and on Bureau planning, with those employees acting all the while in the pay and service of the United States. The water rights thus acquired have in appropriate cases been assigned directly to the United States, as for example in connection with the Curecanti Unit of the Storage Project Act, previously mentioned.

Under Colorado water law, ownership of a water right is not determined in an adjudication proceeding. When a claim is made the trial court determines priority, quantity, and point of diversion. This has been determined, though erroneously it is here urged, for Flattops and for the projects involved in *Four Counties*, adversely to the interests of the United States, the District, and the ultimate beneficiaries. The *res judicata* effect of these decrees will

[33] That the District can and should so do has been recognized by the Colorado courts. See Denver v. Northern Colo. Water Conservancy District, 130 Colo. 375, 412, 421-422, 276 P.2d 992 (1955). The recognition of this practice by the District is typified by the following statement in H.R. Doc. No. 107, 88th Cong., 1st Sess. (1963) containing a letter from the Secretary of the Interior and a Bureau report on the Fruitland Mesa Project in Colorado (p. 28):

> Project Rights—Statements of claim for water rights in the Upper Gunnison River Basin, including rights for the Fruitland Mesa project, have been filed by the Colorado River Water Conservation District which has long been established to encourage water resource developments in western Colorado. The district claims an appropriation date of November 13, 1957, and has adopted a resolution stating that the rights acquired by the district will be transferred to appropriate entities qualified to enter into contract with the United States for construction of the various potential projects in the Upper Gunnison River Basin . . .

undoubtedly be urged if the United States attempts readjudication.

Almost the entire Bureau program of development for the Yampa and Colorado River basins in Colorado is threatened by *Four Counties* and *Flattops.* The proposed decree for the Hayden Mesa Project[34] is presently under attack,[35] and the priority date in the decree for Juniper Reservoir is in litigation.[36]

Great Northern[37] and Parshall, not yet in decree; Bluestone and Battlement Mesa,[38] in decree; and parts of the West Divide and Dallas Creek Projects[39] are all currently subject to similar attack.

Review now, by this Court, of the decisions of the Colorado Supreme Court, could resolve the issues in these attacks against the United States and its beneficiaries.

---

[34] In the amendments to the Storage Project Act included in the Basin Act of 1968, Hayden Mesa, Wessels and Toponas were designated as units of the Upper Yampa Project, and the Middle Park Project was shown as including the Rabbit Ear, Troublesome and Azure units. See also such designation by the Bureau in its recent letter attached hereto as Appendix E.

[35] See Appendix F hereto for protest. The two parties shown, Oak Creek Power Company and Yampa-Green Corporation, neither of which are believed to be operating entities, are understood to be wholly owned by the respondent here, Rocky Mountain Power Company, a similarly inoperative company.

[36] District Court in and for Moffat County, Colorado.

[37] Designated in the Basin Act with Juniper as a unit of the Lower Yampa Project.

[38] Both on the lower Colorado River in Colorado.

[39] Both now authorized for construction in the Storage Project Act through an amendment in the Basin Act.

IV.

THE VALUES TO THE UNITED STATES WHICH STAND TO BE AFFECTED BY THE DECISION BELOW ARE SUBSTANTIAL

Oil shale reserves in Colorado and neighboring states, occurring principally on public lands, are a potentially enormous energy resource for the United States.[40] The Department of the Interior has announced plans for an oil shale leasing program in Colorado and elsewhere to develop such reserves.[41] As part of the record in the instant case, a spokesman for the Navy Department,[42] testifying in 1963, stated that in the next 15 years, defense requirements will have a five million barrel per day deficit which "could and probably should for our own defense effort come from oil shale." (R. 1547)

Colorado oil shale reserves are phenomenally large, one expert testifying that potential richness could be as high as two billion barrels per square mile (R. 1618). It was also estimated that oil shale production would require water in increasingly large amounts as production increases, up to 250,000 acre feet per year for a very large industrial development of the industry (R. 694). The two primary areas of potential reserves of interest in Colorado are in the adjacent Colorado River and White River-Piceance Creek areas (R. 1145); approximately 85% of the volume of these potential reserves is in the White River-Piceance Creek area (R. 1608).

The Flattops Project was designed with oil shale needs in mind (R. 1143, 1246, 1527), and was described as "necessary in the oil shale industry." (R. 1250). Significantly,

---

[40] *One Third of the Nation's Land*: A report to the President and to the Congress by the Public Land Law Review Commission, July, 1970, p. 134.

[41] News Release, Dep't. of Interior, June 29, 1971.

[42] R.H. Nelson, Lt. Cmdr., Civil Engr. Corps, U.S. Navy, Officer in Charge of Naval Petroleum and Oil Shale Reserves (R. 537).

Flattops could supply water for oil shale development in the White River-Piceance Creek area, as well as in the Colorado River area (R. 1422), but it does not appear in the record that the Power Company's plans had this versatility. Indeed, the farsighted nature of the Flattops Project is evident from the fact that it is planned to meet a future demand for industrial and municipal supply to be occasioned by the development of oil shale rather than for agriculture, in an area where a supply for each is essential.

Of the other proposed Reclamation undertakings, the recent letter from the Bureau attached hereto as Appendix E[43] details generally the Bureau program as that program pertains to the Storage Project Act, but only within the State of Colorado. This program is largely duplicated in the other Upper Basin States of New Mexico, Utah and Wyoming. The Bureau, of course, has numerous other programs throughout the States of the West which it administers under general Reclamation Law. If courts in other reclamation states follow the refusal below to recognize priorities for federal undertakings based on the progressive consideration by Congress and the planning detail by the Bureau so clear in the case of the Flattops Project, then the reclamation program generally is endangered. As far as money values are concerned, the Federal investment to June 30, 1970 in Storage Project Act features alone exceeds $784,000,000.[44] It should be noted that this figure relates only to expenditures on projects constructed or authorized for construction.[45] As the Bureau letter shows, several of these projects in Colorado stand to be affected, as well as a num-

---

[43] This letter updates data supplied by the Bureau of Reclamation in 1967 and 1968, and those letters are also included in Appendix E for ready reference.

[44] 14th Annual Report, Colorado River Storage Project and Participating Projects for Fiscal Year Ended June 30, 1970, as required by Section 6 of the Storage Project Act.

[45] Of these projects, those in Colorado are shown on page 1 of the Bureau letter in Appendix E.

ber of projects, like Flattops, on which substantial amounts of public funds have been expended in planning. More importantly, however, are the water and power values these jeopardized projects would develop, and the public needs they have been planned to serve.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

KENNETH BALCOMB
Delaney & Balcomb
Drawer 790
Glenwood Springs, Colorado
81601

ROBERT L. McCARTY
McCarty & Noone
1225 Connecticut Avenue,
N.W.
Washington, D.C. 20036

Attorneys for Petitioner

September 22, 1971

Appendix A

SUPREME COURT OF THE STATE OF COLORADO

No. 22812

THE COLORADO RIVER WATER CONSERVATION DISTRICT,

Plaintiff in Error,

ROCKY MOUNTAIN POWER COMPANY, et al.,

Defendant in Error

ERROR TO THE DISTRICT COURT OF RIO BLANCO COUNTY.

HON. CLIFFORD H. DARROW, JUDGE

EN BANC

JUDGMENT AFFIRMED

[April 19, 1971]

Delaney & Balcomb,
Kenneth Balcomb,
Edward Mulhall, Jr.,

For Plaintiff in Error.

Charles F. Brannan
Williams, Erickson & Wallace,
Wayne D. Williams

For Defendant in Error.

MR. JUSTICE HODGES delivered the opinion of the Court

Plaintiff in error, Colorado River Water Conservation District, brings this writ of error to review a decree of the trial court in a supplemental general water rights adjudication. This decree gives the Conservation District an appropriation date of October 31, 1961 for its "Flattops Project." Defendant in error, Rocky Mountain Power Company sought and obtained in the same adjudication an appropriation date of

September 7, 1957 for its "Sweetwater Hydroelectric Project." Each party entered a protest to the claim of the other. Upon entry of findings of fact by the trial court, the Conservation District filed its "Objections and Exceptions to the Findings." The court overruled these objections and exceptions and entered its decree.

The appropriation date obtained by the Power Company is not contested in this writ of error. The Conservation District's sole argument is that it should have received an appropriation date of June 28, 1954 for its "Flattops Project." This date precedes both the September 7, 1957 date obtained by the Power Company and the October 31, 1961 date which the Conservation District did obtain. We affirm the trial court's determination of October 31, 1961 as the appropriation date for the Conservation District's "Flattops Project."

I.

The Power Company's motion to dismiss this writ of error was denied by this court on August 24, 1967 and the Power Company raises the motion again in its briefs before us. Basically, the contention is that the writ of error should be dismissed, since the Conservation District did not file a motion for new trial under C.R.C.P. 59. We reject this contention.

Colo. Const. art. VI, §21 confers upon the supreme court the power to make rules governing practice in civil cases. The Rules of Civil Procedure apply to all civil cases specified in C.R.C.P. 1 except as "stated in Rule 81." C.R.C.P. 81(a) states that

> "These rules do not govern procedure and practice in any special statutory proceeding insofar as they are inconsistent or in conflict with the procedure and practice provided by the *applicable statute*." (Emphasis added.)

In the instant case, the *applicable statute* [Colo. Sess. Laws 1943, ch. 190, §11 (repealed 1969)] provided that upon the court's initial findings as to the priority date, the volume, the source, and the point of diversion, the parties were entitled

to present "objections and exceptions" to the court's findings prior to the entry of a decree by the court upon such findings.

The Conservation District on August 5, 1966 filed "objections and exceptions" to the court's findings and after a hearing on the matter, the court entered an order overruling these objections and exceptions. On November 21, 1966, the trial court entered its decree in accordance with its findings of fact.

We hold that water adjudication proceedings are "special statutory proceedings" as contemplated under C.R.C.P. 81. *Cf. Westminster v. District Court*, 167 Colo. 263, 447 P.2d 537; *Boxberger v. Highway Comm.*, 126 Colo. 526, 251 P.2d 920; *see also* Peterson, *Rule-Making*, 38 U. Colo. L. Rev. 137 (1966) and cases cited at n. 71 therein.

The purpose of the statutory provision allowing for the filing of "objections and exceptions" to the findings of the court prior to the entry of the decree was to allow the fact finder the opportunity to reconsider the entire case before entering a decree based upon such findings. The reconsideration might well entail questions of law as well as fact. For example, the priority date is termed a "finding" by the statute, but obviously, it must rest upon legal conclusions, such as, the "first step" doctrine involved herein. The new "Water Right Determination and Administration Act of 1969," 1969 Perm. Supp., C.R.S. 1963, 148-21-1 *et seq.*, provides that written protests stating "*[t]he factual and legal grounds* for the protest", shall be filed after entry of a referee's ruling. Thereupon, a hearing is provided for before the "water judge," followed by entry of judgment and decree. Appellate review may be had only as to that part of the decree which confirms a ruling with respect to which a protest was filed. 1969 Perm. Supp., C.R.S. 1963, 148-21-20. The intent is manifest in the 1969 Act that only the protest need be filed in order to obtain appellate review by right.

Although the intent is less manifest in the "old act," cited *supra*, under which this case must be decided, it is nonetheless apparent that its intent was to permit appellate review by

right on the basis of the filed "objections and exceptions" overruled by the trial court. To require in addition, a ruling based upon a motion for a new trial, which motion in most cases would be a repetition of the objections and exceptions, would be an unnecessary burden on the time of the trial court and the parties. As provided in C.R.C.P. 1, these rules must be liberally construed to secure the just, speedy and inexpensive determination of every action.

The cases cited by the Power Company in support of its argument for dismissal of this writ of error are readily distinguished. For example, in *Noice v. Jorgensen*, 151 Colo. 459, 378 P.2d 834, the issue was whether a motion for amendment of the court's findings under C.R.C.P. 52 would suffice as a motion for new trial under C.R.C.P. 59. The motion was made *subsequent* to entry of judgment, as contemplated by C.R.C.P. 52. In the case at bar, the "objections and exceptions" must be filed *before* entry of the decree. In *People v. South Platte Dist.*, 139 Colo. 503, 343 P.2d 812, the statute precluded review by any method except a *quo warranto* proceeding commenced by the attorney general.

II.

The Conservation District's claim to the 1954 date is based upon its assertion that survey work commenced by the Bureau of Reclamation in 1954 may be used as the so-called "first step" of the Conservation District's perfection of its appropriation. *See Four Counties Water Users Ass'n v. Colorado River Water Conservation Dist.*, 161 Colo. 416, 425 P.2d 259, *cert. denied*, 389 U.S. 1049, 88 S.Ct. 765, 19 L.Ed. 2d 840, *rehearing denied*, 390 U.S. 976, 88 S.Ct. 1020, 19 L.Ed. 2d 1197. Some background information is helpful at this point.

In 1949, a study of the Colorado River basin upstream from the City of Grand Junction was begun by the Bureau of Reclamation to determine *potential* water resources development. This study culminated in the publication in 1954 of the Cliffs-Divide Project Report. One page of the 124-page report was concerned with the "White-Colorado Diversion."

This diversion would involve a storage of water from tributaries of the White River and diversion of the water into the Colorado River with attendant power generation and supply of water for industrial and municipal purposes, including support of potential oil shale development. This diversion concept is embodied both in the "Sweetwater Project" of the Power Company and in the "Flattops Project" of the Conservation District, and the existence of either project apparently would preclude the feasibility of the other project.

The Bureau of Reclamation's Cliffs-Divide Project was Supervised by an employee of the Bureau of Reclamation, Phillip P. Smith. In 1953, a similar study of the Yampa and White Rivers was undertaken, again under the supervision of Smith. On June 28, 1954, the date claimed by the Conservation District for its appropriation, survey work on a *potential* Buck Creek Reservoir site (alternatively known as Rio Blanco Reservoir, a part of the Flattops Project) was begun by Smith and his survey party. This study was published in 1957 and is known as the "Yampa White Basin Report." In March 1956, Smith resigned his position with the Bureau of Reclamation and commenced work as the Secretary-Engineer with the Conservation District, which allowed Smith to assist the Bureau in completion of the "Yampa White Basin Report," if his work load for the Conservation District permitted. It should be noted that the Cliffs-Divide and Yampa White Basin Reports, are described throughout the record as "reconnaissance reports," *i.e.*, reports studying *potential development* of the area. Subsequent "feasibility reports" for particular projects were not undertaken, nor were further funds for study appropriated.

On the basis of Smith's work with the Bureau of Reclamation and his subsequent employment with the Conservation District, the Conservation District, without any explanation but the threat of federal application of the doctrine of federal reservation of waters, asserts the 1954 appropriation claim. The doctrine of federal reservation of waters has no application in the determination of this case. The parties involved here are a water conservation district, formed and

empowered under state statute, and a private corporation. The United States government asserts no claim in the adjudication and no privity is shown to exist between the Conservation District and the United States. In fact, in his testimony Mr. Black, the chief of the Bureau of Reclamation's engineering division in the Grand Junction Projects Office, a witness for the Conservation District, stated that to his knowledge the Bureau had made no assignment of any rights to the Conservation District.

Even if by some stretch of the legal imagination, the Conservation District could attribute the work done in 1954 to itself, we find that the case of *Four Counties Water Users Ass'n v. Colo. River Water Conservation Dist., supra,* is directly in point. In that case, a claim by the District based on the same "Yampa White Basin Report" was held by this court to be invalid because the work in making the Report was insufficient to constitute a "first step" toward perfecting an appropriation.

Finally, even if the Bureau's work could be utilized by the Conservation District in perfecting an appropriation, and even if the Bureau's work was sufficient to constitute a valid "first step," still the requisite contemporaneous intent of the Conservation District to appropriate is from the record not shown to have existed until October of 1961, as per the minutes of a meeting of the Conservation District's Board of Directors. See the recent decision of this court in *Elk Rifle Water Co. v. Templeton,* ____ Colo. ____, ____ P.2d ____, Supreme Court No. 22917, announced February 1, 1971. Therein, this court held that the combination of several weeks of intensive survey work in the field, followed immediately by a meeting of corporate officers who decided to proceed with a pipeline and reservoir project, came within the purview of the rule that intent to take must be accompanied by some open physical demonstration of the intent. This general rule which must be adhered to in determining the appropriation date, finds its origin in early Colorado water cases. *Sieber v.*

Frink, 7 Colo. 148, 2 P.901 and *Larimer County Reservoir Co. v. People*, 8 Colo. 614, 9 P.794. *Elk Rifle, supra*, while recognizing the general rule, admonishes that what constitutes the elements of intent and physical act is not the same in every case, and therefore, each case must and should be considered on an *ad hoc* basis.

We conclude therefore that the trial court was correct in not awarding the Conservation District the 1954 date it claims. The decree of the district court in awarding October 31, 1961 to the Conservation District as its appropriation date for its "Flattops Project" is correct.

Judgment affirmed.

MR. JUSTICE GROVES not participating.

Appendix B

STATUTES

Section 15 of the Boulder Canyon Project Act of 1928, 45 Stat. 1057, 1065, 43 U.S.C. § 617n.

> The Secretary of the Interior is authorized and directed to make investigation and public reports of the feasibility of projects for irrigation, generation of electric power, and other purposes in the States of Arizona, Nevada, Colorado, New Mexico, Utah, and Wyoming for the purpose of making such information available to said States and to the Congress, and of formulating a comprehensive scheme of control and the improvement and utilization of the water of the Colorado River and its tributaries. The sum of $250,000 is hereby authorized to be appropriated from said Colorado River Dam fund, created by section 617a of this title, for such purposes.

Section 2 of the Boulder Canyon Project Adjustment Act of 1940, 54 Stat. 744 as amended, 43 U.S.C. §618a, which provides, *inter alia*,

> All receipts from the project shall be paid into the Colorado River Dam Fund and shall be available for:
>
> * * * *
>
> (d) Transfer, subject to the provisions of section 618b of this title, from the Colorado River Dam Fund to a special fund in the Treasury, established and designated the "Colorado River Development Fund", of the sum of $500,000 for the year of operation ending May 31, 1938, and the like sum of $500,000 for each year of operation thereafter, until and including the year of operation ending May 31, 1987 . . . Receipts of the Colorado River Development Fund for the years of operation ending in 1938, 1939, and 1940 . . . are authorized to be approriated only for the continuation and extension, under the direction of the Secretary, of studies and investigations by the Bureau of Reclamation for the formula-

tion of a comprehensive plan for the utilization of waters of the Colorado River System for irrigation, electrical power, and other purposes, in the States of the upper division and the States of the lower division including studies of quantity and quality of water and all other relevant factors. The next such receipts up to and including the receipts for the year of operation ending in 1955 are authorized to be appropriated only for the investigation and construction of projects for such utilization in and equitably distributed among the four States of the upper division . . . .

Sections 1, 2 and 3 of the Colorado River Storage Project Act of 1956, 70 Stat. 105, *as amended*, 43 U.S.C. §§ 620, 620a and 620b, provide in pertinent part:

Section 1.

In order to initiate the comprehensive development of the water resources of the Upper Colorado River Basin, for the purposes, among others, of regulating the flow of the Colorado River, storing water for beneficial consumptive use, making it possible for the States of the Upper Basin to utilize, consistently with the provisions of the Colorado River Compact, the apportionments made to and among them in the Colorado River Compact and the Upper Colorado River Basin Compact, respectively, providing for the reclamation of arid and semiarid land, for the control of floods, and for the generation of hydroelectric power, as an incident of the foregoing purposes, the Secretary of the Interior is authorized (1) to construct, operate, and maintain the following initial units of the Colorado River storage project, consisting of dams, reservoirs, powerplants, transmission facilities and appurtenant works: Curecanti, Flaming Gorge, Navajo (dam and reservoir only), and Glen Canyon; . . . and (2) to construct, operate, and maintain the following additional reclamation projects (including power-generating and transmission facilities related thereto), hereinafter referred to as participating projects: Central Utah (initial phase and the Uintah

unit), San Juan-Chama (initial stage), Emery County, Florida, Hammond, La Barge, Lyman, Navajo Indian, Paonia (including the Minnesota unit, a dam and reservoir on Muddy Creek just above its confluence with the North Fork of the Gunnison River, and other necessary works), Animas-La Plata, Dolores, Dallas Creek, West Divide, San Miguel, Seedskadee, Savery-Pot Hook, Bostwick Park, Fruitland Mesa, Silt and Smith Fork: . . .

Section 2.

In carrying out further investigations of projects under the Federal reclamation laws in the Upper Colorado River Basin, the Secretary shall give priority to completion of planning reports on the Gooseberry, Eagle Divide, Bluestone, Battlement Mesa, Grand Mesa, Yellow Jacket, Basalt, Middle Park (including the Troublesome, Rabbit Ear, and Azure units), Upper Gunnison, including the East River, Ohio Creek, and Tomichi Creek units), Lower Yampa (including the Juniper and Great Northern units), Upper Yampa (including the Hayden Mesa, Wessels, and Toponas units) and Sublette (including a diversion of water from the Green River to the North Platte River Basin in Wyoming), Ute Indian unit of the Central Utah Project, San Juan County (Utah), Price River, Grand County (Utah), Gray Canyon, and Juniper (Utah) participating projects:[1] . . . Said reports shall

[1] By the Act of June 13, 1962, § 18, 76 Stat. 96, 102, the San Juna-Chama and Navajo Projects were deleted from this section and added to Section 1 of the Colorado River Storage Project Act as named participating projects authorized for construction. By the Act of September 2, 1964, 78 Stat. 852, the Savery-Pot Hook, Bostwick Park, and Fruitland Mesa Projects were deleted from this section and added to Section 1 as participating projects authorized for construction. By the Act of September 30, 1968, 82 Stat. 896 (the Colorado River Basin Project Act of 1968), Dallas Creek, West Divide, Dolores, San Miguel and Animas-La Plata projects were deleted from this section and added to Section 1 of the Storage Project Act as named participating projects authorized for construction. Additionally, Congress deleted the original reference to certain provisions and substituted therefor Basalt, Middle Park (including the Troublesome,

be completed as expeditiously as funds are made available therefor and shall be submitted promptly to the affected States, . . . and thereafter to the President and the Congress: . . . . The preparation of detailed designs and specifications for the works proposed to be constructed in connection with projects shall be carried as far forward as the investigations thereof indicate is reasonable in the circumstances.

Section 3.

It is not the intention of Congress, in authorizing only those projects designated in section 620 of this title, and in authorizing priority in planning only those additional projects designated in section 620a of this title, to limit, restrict, or otherwise interfere with such comprehensive development as will provide for the consumptive use by States of the Upper Colorado River Basin of waters, the use of which is apportioned to the Upper Colorado River Basin by the Colorado River Compact and to each State thereof by the Upper Colorado River Basin Compact, nor to preclude consideration and authorization by the Congress of additional projects under the allocations in the compacts as additional needs are indicated. . . .[2]

Rabbit Ear, and Azure units), Upper Gunnison (including the East River, Ohio Creek, and Tomichi Creek units), Lower Yampa (including the Juniper and Great Northern units) and Upper Yampa (including the Hayden Mesa, Wessels, and Toponas units). Other changes not mere material were also made.

[2]Basalt, being a clear implementation of this section, was, in Section 1(b) of the Act of August 16, 1962, 76 Stat. 389, 43 U.S.C. § 616(b) added, to Section 2 of the Colorado River Storage Project Act for priority of planning. The Colorado River Basin Project Act again recognized this provision by directing priority of planning for, not only Basalt, but also Azure, Wessels, Toponas and Hayden Mesa.

Appendix C

The following is a reprinting of what appears at p. 104 of the Cliffs Divide Report, U.S. Bureau of Reclamation (February, 1954):

White-Colorado Diversion

A transmountain diversion from the headwaters of the White River, a tributary of the Green River, to the Colorado River is a possibility that should receive attention in future studies. Under one plan, roughly formulated from general data, about 100,000 acre-feet of water could be diverted annually from the North and South Forks of White River, regulated by storage, and conveyed to Canyon Creek, which joins the Colorado River about 8 miles below Glenwood Springs. Three power drops along the diversion route, totaling about 3,500 feet, could be utilized. The water would be of excellent quality for domestic or industrial use and could be made available to communities in the Colorado River valley from Glenwood Springs to DeBeque—an area that includes potential sites of substantial oil shale development.

Storage regulation for the North Fork of White River could be provided at Trappers Lake on that stream. A 5.7-mile tunnel heading at the lake at elevation 9,800 feet would convey about 20,000 acre-feet of water annually to the South Fork drainage area. This water, augmented by the runoff from about 20 square miles tributary to the South Fork, would be conveyed 5 miles along the west side of the South Fork valley, mostly by bench flume. It would then be dropped through a penstock about 600 feet to a powerplant with a tailrace discharging into a potential reservoir at the Buck Creek site on the South Fork at elevation 9,100 feet.

Water regulated in the Buck Creek Reservoir, approximating 100,000 acre-feet annually, would be conveyed by an 11.5-mile tunnel to Canyon Creek. There it would be joined

by the runoff from about 18 square miles of the Canyon Creek drainage area. The combined flows would be conveyed by conduit about 4 miles along the east side of Canyon Creek and then dropped through 2,500 feet of head to a powerplant on Canyon Creek at elevation 6,300 feet. Water released from this plant, plus natural flows of Canyon Creek, would be regulated at the Bearwallow Reservoir that would be constructed on Canyon Creek immediately above the mouth of Bearwallow Creek. Releases from Bearwallow Reservoir, averaging about 130,000 acre-feet annually, would be conveyed 3 miles by conduit along the west side of Canyon Creek to a penstock and there dropped about 500 feet to a powerplant located near the mouth of Canyon Creek. Water discharged from this plant would be available for other uses, including municipal and industrial uses in the Colorado River valley.

Any further studies made of this potential diversion should include consideration of the alternative use of White River water for further irrigation and power development in the White, Yampa, and Green River Basins.

The following is a reprinting of what appears in pp. 65-75, both inclusive, of the Yampa-White Report, U.S. Bureau of Reclamation (February, 1957):

Flattops Unit

The Flattops unit is a potential transbasin diversion from the South Fork of the White River to Canyon Creek, a tributary of the Colorado River that enters the Colorado about 6 miles west of Glenwood Springs. The primary purpose of the unit would be to supply municipal and industrial water for impending oil shale and industrial development along the Colorado River in the vicinity of the Colorado towns of Rifle, Grand Valley, and De Beque. The unit also would generate hydroelectric energy and incidentally would increase power generation at the potential downstream

De Beque unit of the Colorado River Storage project if that unit should be constructed.

With full development the Flattops unit would annually provide 128,000 acre-feet of high quality water for municipal and industrial use. With an average per capita use of 200 gallons per day, this amount of water would be sufficient to supply a population of about 568,000. With full development the unit also would have an installed power generating capacity of 51,000 kilowatts and would provide about 221,300,000 kilowatt-hours of saleable energy annually.

Unit plan

Water for the Flattops unit would be obtained primarily through diversion and storage regulation of surplus water in the South Fork of White River. Storage would be provided at the potential Rio Blanco Reservoir on the South Fork. Additional water would be obtained through diversions from Deep Lake, a natural lake in the Colorado River drainage, into South Fork drainage at a point about the potential Rio Blanco Reservoir, through diversions from Patterson Creek, tributary to the South Fork below the reservoir, into the Rio Blanco Reservoir, and through diversion and regulation of excess flows in the Canyon Creek drainage. The required storage on Canyon Creek would be provided at the potential Bearwallow Reservoir. The water in the Canyon Creek drainage would be obtained from Canyon Creek itself and from East Canyon and Possum Creeks, both tributaries to Canyon Creek below the reservoir. The water from East Canyon and Possum Creeks would be diverted into the Bearwallow Reservoir by means of the Possum Creek collection system.

The plan of operation involves regulation of the South Fork, Deep Lake, and Patterson Creek water in the Rio Blanco Reservoir. Water would be released from the reservoir into the Flattops tunnel and conveyed to Canyon Creek. The releases would be made to augment the flows

of Canyon Creek at the tunnel portal and to provide a constant flow for diversion to the Upper Bearwallow powerplant that would be constructed on the upper shore of Bearwallow Reservoir. Water released through the powerplant, additional water from Canyon Creek, and the East Canyon and Possum Creek water would be regulated in the Bearwallow Reservoir. The water would be released from the reservoir as required to meet the municipal and industrial demand. Part of the Bearwallow Reservoir releases, up to a maximum of 100 second-feet, would be diverted at the reservoir outlet and conveyed to the potential Lower Bearwallow powerplant at the mouth of Canyon Creek.

Both the upper and lower powerplants would receive their water supply from bench flumes and penstocks that would extend from Canyon Creek. Forebay storage also would be provided for the upper plant. Transmission facilities would be provided for distribution of power from the upper and lower plants.

The municipal and industrial water would be available at the tailrace of the lower powerplant. Facilities for the conveyance of the water from the mouth of Canyon Creek to points of use and necessary filtration and chlorination are considered in this analysis as the responsibility of the water users.

The Flattops unit is designed for construction in stages as the municipal and industrial demand increases. In all, six stages are planned, with the development of the collection and regulatory facilities generally moving northward from Canyon Creek.

Initially or in Stage 1, the municipal and industrial water would be supplied from excess flows of Canyon Creek. The construction would include only the Bearwallow Reservoir on Canyon Creek. This stage would provide 35,500 acre-feet of municipal and industrial water annually.

Stage 2 would involve the addition of the Possum Creek collection system, including diversion dams and canals.

This stage would add 2,200 acre-feet of municipal and industrial water annually, bringing the total unit supply to 37,700 acre-feet annually.

Stage 3 would include the addition of the Flattops tunnel from the South Fork of the White River to Canyon Creek and diversion facilities on the South Fork. This development would not include any storage on the South Fork and would operate only from mid-April through November. Stage 3 would add 24,000 acre-feet to the municipal and industrial supply, thus increasing the total to 61,700 acre-feet.

In Stage 4 storage would be added on the South Fork of White River at the Rio Blanco site, and the two powerplants on Canyon Creek would be constructed with necessary transmission facilities. Rio Blanco Dam would be constructed at the head of the Flattops tunnel and would incorporate the diversion facilities of the tunnel provided under Stage 3. The development would add 44,900 acre-feet annually to the municipal and industrial supply, bringing the total supply to 106,600 acre-feet. It would also provide 178,800,000 kilowatt-hours of saleable energy each year.

As Stage 5 the Deep Lake collection system would be added to the Flattops unit. This system would include a concrete weir at the outlet of Deep Lake and a tunnel from the north side of the lake to Buck Creek. Stage 5 would add 7,300 acre-feet of municipal and industrial water annually, bringing the total unit supply to 113,900 acre-feet annually. It would bring the total saleable generation to 193,400,000 kilowatt-hours annually.

Stage 6 would include the addition of the Patterson Creek collection system, including a diversion dam and covered bench flume. It would bring the total municipal and industrial supply to 128,000 acre-feet annually and would make possible a total saleable generation of 221,300,000 kilowatt-hours annually, thus attaining full project development.

Bearwallow Reservoir

Bearwallow Reservoir on Canyon Creek would have a capacity of 47,200 acre-feet, including 46,900 acre-feet of active capacity and 300 acre-feet for storage of sediment. The reservoir would have a normal water surface elevation of 6,365 feet. The minimum water surface elevation would be determined by the outlet elevation which would in turn be determined from sediment studies. The dam forming the reservoir would be a rolled earth-fill structure 280 feet in height above streambed and 2,380 feet long at the crest. The outlet works, with a capacity of 350 second-feet, would be a concrete-lined conduit through the center of the dam. A side channel spillway would be provided on the left abutment.

Rio Blanco Reservoir

Rio Blanco Reservoir on the South Fork of White River would have a capacity of 137,400 acre-feet, including 136,700 acre-feet of active capacity, 300 acre-feet of dead storage, and 400 acre-feet for storage of sediment. The reservoir would have a normal water surface elevation of 9,271 feet and a dead storage elevation of 9,020 feet. The dam forming the reservoir would be a rolled earth-fill structure 290 feet in height above streambed and 2,100 feet long at the crest. Two outlet works, with a total capacity of 290 second-feet, would be provided in the left abutment. One with a capacity of 255 second-feet would deliver water to the Flattops tunnel while the other with a capacity of 35 second-feet would provide water to the South Fork. The spillway for the reservoir would also be located in the left abutment.

Possum Creek Collection System

Possum Creek collection system would include two concrete-lined canals. One, extending from Possum Creek to East Canyon Creek, would be 1.4 miles long and would

have a capacity of 60 second-feet. The other, extending from East Canyon Creek to Bearwallow Reservoir, would be 1.02 miles long and would have a capacity of 1.15 second-feet. Two rock-fill diversion dams also would be constructed—one at the head of each canal.

Flattops Tunnel

The Flattops tunnel, extending from the outlet of Rio Blanco Reservoir to Canyon Creek, would consist of a concrete-lined horseshoe section. It would have an inside diameter of 7 feet and would be 11.54 miles long. Constructed with a grade of 0.00154, the tunnel would provide a capacity of 254 second-feet.

Deep Lake Collection System

The Deep Lake collection system would include a concrete weir at the outlet of Deep Lake and a tunnel from the north side of the lake to the Buck Creek drainage. The tunnel would consist of a concrete-lined horseshoe section with an inside diameter of 7 feet. It would be 0.59 mile long.

Patterson Creek Collection System

The Patterson Creek collection system would include a rock-fill diversion dam on Patterson Creek and a covered bench flume from the dam to Rio Blanco Reservoir. The bench flume would have a capacity of 75 second-feet and would be 3.95 miles long.

Upper Bearwallow Powerplant

The Upper Bearwallow powerplant on the upper shore of Bearwallow Reservoir would have an installed capacity of 48,000 kilowatts. With full development of the Flattops unit the plant could produce 208,600,000 kilowatt-hours annually at a plant factor of 50 percent annually. The plant would be operated semiautomatically. The bench flume that would convey water for the plant would head at a rock-fill diversion dam on Canyon Creek at the outlet

portal of the Flattops tunnel and would extend along the east side of Canyon Creek. The flume would be 4.54 miles long and would have a capacity of 140 second-feet. About 140 acre-feet of forebay storage would be provided at the end of the conduit. A penstock extending from the forebay to the plant would be 5,900 feet long and would have an inside diameter of 51 inches. The penstock and powerplant would operate under a static head of 2,510 feet.

Lower Bearwallow Powerplant

The Lower Bearwallow powerplant at the mouth of Canyon Creek would have an installed generating capacity of 3,000 kilowatts. With full development of the Flattops unit it could produce 26,800,000 kilowatt-hours of electric energy annually at a plant factor of 100 percent. The plant would be of semiautomatic operation. The bench flume that would convey water for the plant would head at the outlet of Bearwallow Reservoir and would extend 2.37 miles along the west side of Canyon Creek. The flume would have a capacity of 100 second-feet. From the flume to the plant the water would be conveyed in a penstock 2,130 feet long and with an inside diameter of 30 inches. The penstock and powerplant would operate under a static head of 452 feet.

Transmission System

The transmission system would consist of a switchyard at the Upper Bearwallow powerplant, a transmission line from the upper plant to the lower plant, and a switchyard and substation at the lower plant. The substation at the lower plant could be interconnected with a 230-kilovolt transmission line between Denver and Grand Junction proposed by the Public Service Company of Colorado or it could be interconnected with potential units of the Colorado River Storage project. As the transmission system cannot be designed with any degree of finality at this time, an allowance of $100 per kilowatt of installed capacity has been included to obtain a representative cost for the unit.

Construction Considerations

No geological problems are apparent that would seriously hamper the construction of features of the Flattops unit. A minimum construction period of about 4 years would be required for the complete unit. Surface work would be limited by climatic conditions to the period from May through October. A construction camp and access roads would be required for features in the basin of the South Fork of the White River. Housing facilities would be available in nearby communities for features in the Canyon Creek drainage.

Cost estimates

The construction cost of the Flattops unit is estimated at $62,300,000 and its annual operation, maintenance, and replacement costs at $410,200. Estimated costs of the unit are itemized on the following page.

Estimated costs—Flattops unit

Feature	*Construction cost*	*Annual operation, maintenance, and replacement costs*
Bearwallow Reservoir	$ 9,170,000	$ 5,400
Rio Blanco Reservoir	16,738,000	13,700
Possum Creek collection system	283,000	1,100
Flattops tunnel[1]	13,399,000	5,800
Deep Lake collection system	592,000	1,000
Patterson Creek collection system	1,646,000	1,900
Upper Bearwallow powerplant[2]	13,071,000	224,200
Lower Bearwallow powerplant[2]	1,494,000	49,500
Transmission system	5,100,000	107,600
Access roads	240,000	—
Past investigations	15,000	—
Future investigations	552,000	—
Total	62,300,000	410,200

[1] Costs of initial diversion facilities on the South Fork of the White River that would be incorporated in the Rio Blanco Dam are estimated at $300,000.

[2] Includes costs for appurtenant features for delivery of water.

Water supply

Studies made over the 1929-43 period indicated that full development of the Flattops unit would deplete the flows of the White River by an average of 80,670 acre-feet annually. Of this amount approximately 32,000 acre-feet annually would be lost in evaporation and consumed for municipal and industrial uses. The remaining 48,670 acre-feet annually would accrue to the Colorado River and be available for use at the potential De Beque hydro-power development.

Municipal and industrial water development

Costs of developing municipal and industrial water would vary with the different stages of the Flattops unit. They would reach a amximum at Stage 3 and minimum at Stage 6. Costs also would vary with the point of delivery, approximately $35 per million gallons being required for conveyance of water from the mouth of Canyon Creek to the points of use. Estimated costs are shown in the tabulation below. Costs in addition to those shown would be incurred for filtration and chlorination.

Water available at mouth of Canyon Creek

	Cost per million gallons	*Cost per acre-foot*
Stage 1	$30	$ 9.80
Stage 3	43	14.00
Stage 6	26	8.40

Water delivered at points of use

	Cost per million gallons	*Cost per acre-foot*
Stage 1	$65	$21.20
Stage 3	78	25.40
Stage 6	61	19.80

Costs of the Flattops municipal and industrial development compare favorably with costs of alternative plans for serving the Rifle, Grand Valley, and De Beque area. Water could readily be pumped to the area from the Colorado River. The Colorado River water, however, is of poor quality and would require extensive treatment before it could meet the minimum standards for municipal use. The cost of pumping and of providing lime and soda ash for hardness treatment is estimated at about $81 per million gallons ($26.40 per acre-foot). Additional costs would be incurred for filtration and chlorination. Approximately 20,000 acre-feet of municipal and industrial water could be obtained from the potential West Divide project at a cost of about $80 per million gallons ($26.10 per acre-foot), exclusive of the costs of chlorination and filtration.

Costs of obtaining municipal and industrial water under the various alternatives have been estimated by amortizing the construction costs of such developments (municipal and industrial water allocation in cases of multiple-purpose projects) over a 50-year period at 2.5 percent. Allowances also were made for annual operation, maintenance, and replacement costs.

Power development

Gross generation of the Flattops unit would amount to 235,400,000 kilowatt-hours annually. With plant uses and transformation and transmission losses estimated at 6 percent, the saleable energy would average 221,300,000 kilowatt-hours annually.

The Flattops unit would be located in Division VI of the power market area defined for the Colorado River Storage project in the project report of December 1950. The division consists principally of the northwest quarter of the State of Colorado.

The need for power in the general vicinity of the Flattops unit is indicated by power market studies made by the Bureau of Reclamation for the potential Curecanti unit of

the Colorado River Storage project and discussed in the Bureau's Status Report on the Curecanti unit of February 1956. These studies were made for Division VI, in which the Flattops unit would be located, and for the nearby Division VII which includes the southwestern part of Colorado and the northeastern part of New Mexico. The surveys indicate that by 1970 Divisions VI and VII will require more new energy than could be provided by the Curecanti unit alone. As the powerplants of the Flattops unit would not be constructed until the municipal demand exceeded 61,700 acre-feet a year, equivalent to a population of about 274,000 with an average per capita use of 200 gallons per day, the power output from the unit is expected to be readily absorbed in the market area.

The economic value of power in Divisions VI and VII was estimated for the Status Report on the Curecanti unit. The economic value was assumed to be equal to the cost of producing equivalent power by fuel-electric generating plants. Inasmuch as the principal low-cost fuels in the area are coal and natural gas, the costs were based on steam-electric plants. So estimated, the average cost of alternative power is 8.43 mills per kilowatt-hour on the basis of public financing and 12.91 mills per kilowatt-hour on the basis of private financing. Since publicly financed steam-electric plants are improbable, the figure of 12.91 mills per kilowatt-hour may be taken as the value of new power in the area. This is substantially higher than the estimated cost of 7.5 mills per kilowatt-hour of energy from the Flattops unit as estimated in the following section.

Cost allocations and repayment

Unit costs were allocated to power and municipal and industrial water by the alternative-justifiable-expenditure method as shown below. Costs of interest during construction were included in the allocations of construction costs for both purposes.

Cost Allocations—Flattops Unit

Purpose	Construction cost	Interest during construction	Total capital investment	Annual operation maintenance, and replacement costs
Power	$33,924,000	$1,687,000	$35,611,000	$391,600
Municipal and Industrial Water	28,376,000	1,400,000	29,776,000	18,600
Total	$62,300,000	3,087,000	65,387,000	410,200

Rates of payment for the power and municipal users were determined as the amounts required for payment of the respective operation, maintenance, and replacement costs and for amortization of the allocations of the capital investment over a 50-year period at 2.5 percent interest. The rates so determined would amount to 7.5 mills per kilowatt-hour of saleable energy and $26 per million gallons of municipal and industrial water at the mouth of Canyon Creek. At the estimated rates annual payments by the power users would amount to $1,647,200, and annual payments by the municipal and industrial water users would amount to $1,068,500. Thus over a 50-year period payments by the power users would amount to $82,360,000 and payments by the municipal and industrial water users would amount to $53,425,000.

Benefit Cost Analysis

Annual benefits from the Flattops unit would amount to about $4,705,800 annually. This estimate includes a benefit value of $2,857,100 from power and $1,848,700 from municipal and industrial water.

Average annual equivalent costs would amount to $3,036,300 as shown in the tabulation below.

	Total value	Average annual equivalent cost
Construction cost	$62,300,000	
Interest during construction	3,087,000	
Net capital investment	65,387,000	$1,785,700
Operation, maintenance, and replacement costs		410,200
Assigned cost of Colorado River Storate project		80,000
Taxes foregone[1]		760,400
Total		3,036,300

[1]The amount of taxes that would be paid under private development of alternative steam-electric power.

The benefits of the Flattops unit would compare with the costs in a ratio of about 1.5 to 1. The net benefits (benefits in excess of costs) would amount to $1,669,500.

Plan selection and alternatives

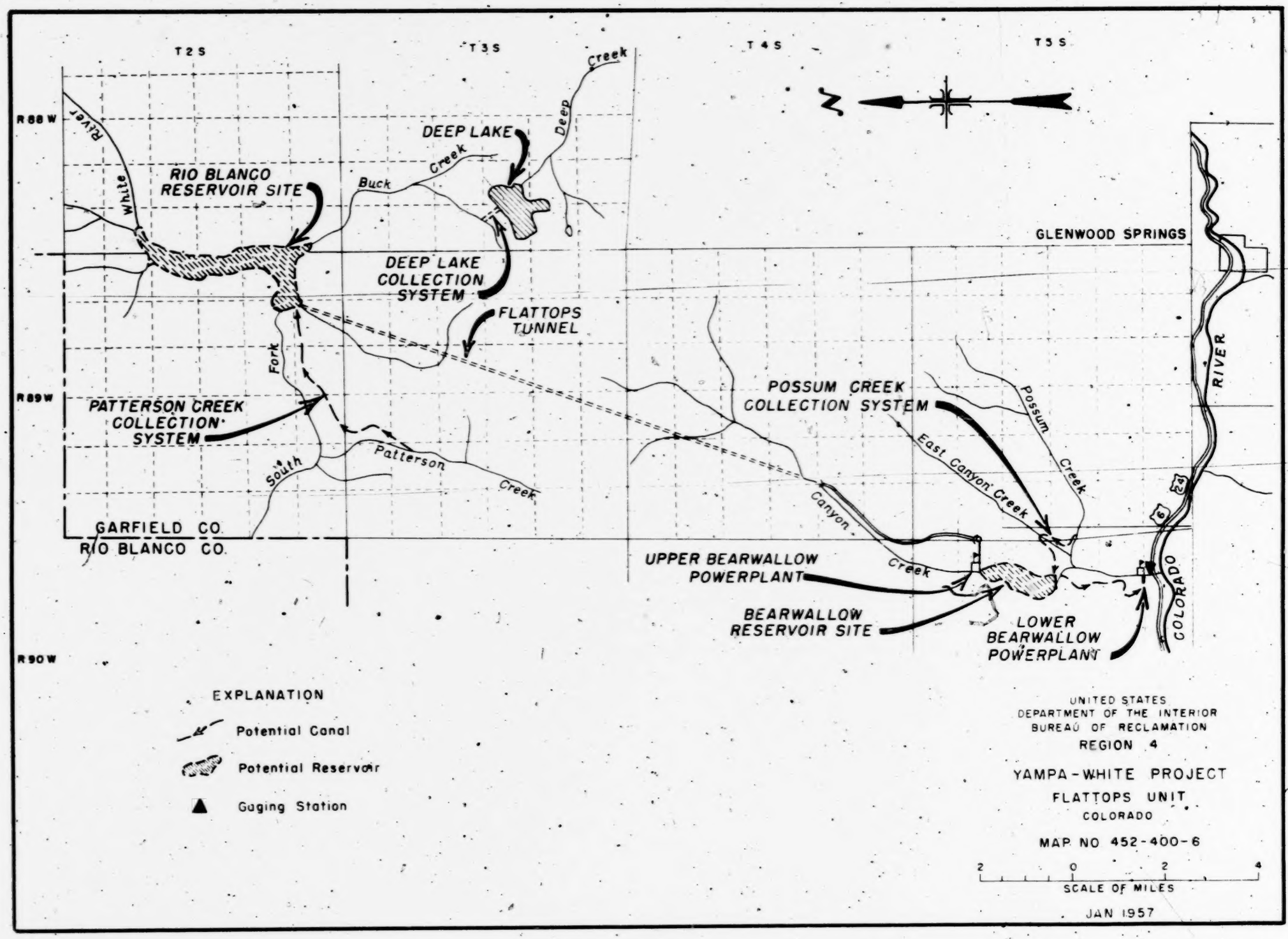
Studies of the Flattops unit have been made to obtain preliminary information on a plan to furnish high quality municipal and industrial water for impending oil shale and related industrial development near Rifle, Grand Valley, and DeBeque, Colo. The probable extent and rate of the oil shale development are major factors in the selection of the most feasible plan for providing this water. The plan selected for the Flattops unit is one that allows the construction to proceed in stages and at each stage provides an economically feasible development. Capacities of the various features of the unit are such that with full development the plan would provide maximum net benefits.

The plan for the Flattops unit could be enlarged to include a diversion from Trappers Lake. The enlargement would require about 6 miles of tunnel and would provide an additional 20,000 acre-feet of municipal and industrial water annually. This enlargement would conflict with the Yellow

Jacket unit and in view of the uncertain demand for municipal and industrial water has not been included in the appraisal of the unit.

Alternative plans that would utilize the same water supply as the Flattops unit include the three plans for use of the Buford Reservoir site that are discussed on page 63 in connection with the Yellow Jacket unit. The main alternative is the large diversion to the Colorado River. This alternative would include 210,000 acre-feet of storage at the Buford Reservoir site on the White River, about 19 miles of tunnel to convey the water to the Middle Fork of Elk Creek in the Colorado River Basin, and hydroelectric facilities along Elk Creek. It would serve the Yellow Jacket and Josephine Basin areas of the Yellow Jacket unit in the White River Basin and would allow an average annual diversion to the Colorado River of about 280,000 acre-feet. Of this diverted flow, an average of 350 second-feet or 253,000 acre-feet annually would be considered firm flow. Even without seasonal regulation, this amount of diverted water would be sufficient to supply about the same population as could be supplied from a fully developed Flattops unit.

The plan for a large diversion to the Colorado River would conflict with both the Yellow Jacket and Flattops units for the use of excess water in the White River. With assumed full development, however, it is potentially more desirable than the two smaller selected plans. The disadvantage of the large plan is that it would require the construction of all the features initially and, as a result, would be economically infeasible if the municipal and industrial demand did not ultimately use the full amount of water provided. Further consideration should be given to this plan in future studies of either the Yellow Jacket or Flattops unit as more definite information should then be available on the location of, and requirements for, oil shale development. Also consideration should be given to the fact that a large part of the oil shale development could occur in the Piceance Creek drainage and thus impose additional demands on flows of the White River.


T2S
T3S
T4S
T5S
R88W
R89W
R90W
RIO BLANCO RESERVOIR SITE
DEEP LAKE
DEEP LAKE COLLECTION SYSTEM
FLATTOPS TUNNEL
PATTERSON CREEK COLLECTION SYSTEM
POSSUM CREEK COLLECTION SYSTEM
UPPER BEARWALLOW POWERPLANT
BEARWALLOW RESERVOIR SITE
LOWER BEARWALLOW POWERPLANT
GLENWOOD SPRINGS
GARFIELD CO.
RIO BLANCO CO.
White River
Buck Creek
Deep Creek
South Fork
Patterson Creek
East Canyon Creek
Possum Creek
Canyon Creek
COLORADO RIVER
EXPLANATION
Potential Canal
Potential Reservoir
Gaging Station
UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
REGION 4
YAMPA-WHITE PROJECT
FLATTOPS UNIT
COLORADO
MAP NO 452-400-6
2 0 2 4
SCALE OF MILES
JAN 1957

Appendix D

ASSIGNMENT OF WATER RIGHTS

THIS ASSIGNMENT, made this 26th day of January, 1962, by the COLORADO RIVER WATER CONSERVATION DISTRICT, organized under and by virtue of the laws of the State of Colorado, Assignor, herein styled the District, to THE UNITED STATES OF AMERICA, Department of the Interior, Assignee, herein styled the United States,

WHEREAS, the United States of America is initiating construction of the Curecanti Unit, a unit of the Colorado River Storage Project, for the purpose, among others, of stabilizing the flows of the Colorado River in order to permit the Upper Basin States to more fully utilize their allocation of the river waters, as set forth in the Upper Colorado River Basin Compact.

WHEREAS, the District has obtained conditionally decreed water rights for said Unit for the purpose of assisting in the development of said Curecanti Unit, and of making provision for development, within the District, of the water resources of the Gunnison River and its tributaries in accordance with the responsibilities of the District, provided in Chapter 149, Article 8, Colo. Rev. Stats. 1953.

NOW, THEREFORE, The District, in consideration of the sum of One Dollar and for other good and valuable consideration, does hereby assign, set over and transfer unto the United States, all of the right, title, interest, claim and priority of the District in and to the following described decrees and conditional priorities and the waters represented thereby:

Decree in the Matter of the Adjudication of Priorities for Water Rights in Water District No. 62 in the State of Colorado, Civil Action 6981, recorded in Montrose County, Colorado, March 30, 1960, in Book 27, Page 293, to wit:

DITCH OR PROJECT NO. 282

CONDITIONAL PRIORITY NO. 445

Crystal Reservoir Storage.
CONDITIONAL PRIORITY NO. 446
Crystal Power Plant Direct Flow.
CONDITIONAL PRIORITY NO. 447
Blue Mesa Reservoir Storage.
CONDITIONAL PRIORITY NO. 448
Blue Mesa Power Plant Direct Flow.
CONDITIONAL PRIORITY NO. 449
Morrow Point Reservoir Storage.
CONDITIONAL PRIORITY NO. 450
Morrow Point Power Plant Direct Flow.

Decree in the Matter of the Adjudication of Priorities for Water Rights in Water District No. 59 in the State of Colorado, Civil Action 5590, recorded in Gunnison County, Colorado, January 27, 1961, in Judgment Book No. C, Page 317, to-wit:

THE CURECANTI UNIT

CONDITIONAL PRIORITY NO. 565
Blue Mesa Reservoir Storage.
CONDITIONAL PRIORITY NO. 566
Blue Mesa Power Plant Direct Flow.
CONDITIONAL PRIORITY NO. 567
Morrow Point Reservoir Storage.
CONDITIONAL PRIORITY NO. 568
Morrow Point Power Plant Direct Flow.

This assignment is made by the District and accepted by the United States upon the condition that the water rights assigned will be utilized for the devleopment and operation of the Curecanti Unit in a manner consistent with the development of water resources for beneficial use in the natural basin of the Gunnison River.

IN WITNESS WHEREOF, the District has caused this Assignment to be executed the day and year first above written.

THE COLORADO RIVER WATER CONSERVATION DISTRICT

ATTEST:

/s/Philip P. Smith
Secretary

By /s/A. Allen Brown
President

STATE OF COLORADO,)
COUNTY OF GARFIELD.) ss.

On the 26 day of January, 1962, personally appeared before me A. Allen Brown and Philip P. Smith, who being by me duly sworn did say that they are the duly appointed, qualified and acting President and Secretary, respectively, in and for the Colorado River Water Conservation District of the State of Colorado, and that the within and foregoing instrument was signed in behalf of said District by authority of a resolution of the Board of Directors of said Colorado River Water Conservation District, and the said District executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

(SEAL)

/s/Edith B. Williams
Notary Public
Residing at Glenwood Spring, Colo.
State of Colorado

My Commission Expires:
Oct. 23, 1965.

Appendix E

United States Department of the Interior

BUREAU OF RECLAMATION
WASHINGTON, D.C. 20240

IN REPLY
REFER TO: 400

SEP 17 1971

Colorado River Water
Conservation District
P. O. Box 282
Glenwood Springs, Colorado 81601

Gentlemen:

This is in response to your request that we update certain Reclamation project data supplied to you under dates of August 10, 1967, October 23, 1967, and January 31, 1968, in connection with the threat to water rights arising from the holdings in the then pending Four Counties cases (involving Rabbit Ear, Troublesome, Wessels and Toponas proposed Federal Reclamation projects), the principles of which cases have recently been reaffirmed by the Supreme Court of Colorado in Colorado River Water Conservation District v. Rocky Mountain Power Company, et al. 486 P. 2d. 438 involving the proposed Flattops Reclamation project.

Updating our 1967 information, the following projects have been authorized for construction:

Project	Expenditures to 6/30/71	Total Estimated Costs
Florida	$ 11,194,298	$ 11,194,298
Paonia	8,212,196	8,212,196
Smith Fork	4,565,707	4,565,707
Silt	7,387,962	7,810,536
Curecanti	85,156,283	129,536,000
Bostwick Park	7,655,998	9,057,000
Fruitland Mesa	1,264,138	40,776,000
Savery-Pot Hook	1,039,685	45,560,000
Dallas Creek	822,210	37,687,000
West Divide	1,011,506	99,800,000
Dolores	1,015,264	53,850,000
San Miguel	1,008,496	73,140,000
Animas-LaPlata	1,104,861	115,880,000

The first four (4) have been constructed. Curecanti has two of its three dams and powerplants completed, Bostwick Park is practically completed, and advanced planning preparatory to

construction is in progress on Fruitland Mesa, Savery-Pot Hook, Dallas Creek, Dolores, Animas-LaPlata, and San Miguel.

Feasibility reports either have been or are being prepared on the following projects.

Project	Expended to Date 6/30/71	Estimated Total Cost
Lower Yampa (includes the Great Northern Unit, and the Juniper Project)	$690,027	$168,697,000
Yellow Jacket	592,000	54,023,000
Grand Mesa	767,414	69,455,000
Battlement Mesa	410,120	16,959,000
Bluestone	471,841	12,058,000
Upper Gunnison	827,686	18,700,000
Basalt	473,583	17,545,000

Reconnaissance reports have been completed and feasibility investigations are scheduled or will be scheduled on the following projects.

	Expended to Date 6/30/71
Middle Park (includes Rabbit Ear, Troublesome, and Parshall)	$ 90,454
Upper Yampa (includes Wessels, Toponas, and Hayden Mesa)	47,242
Burns	12,284
Flattops	31,782
Eagle Divide	16,326

Of the projects named above, decrees or proposed decrees for water rights in the name of an interested district for Rabbit Ear, Troublesome, Wessels, Toponas, Hayden Mesa, Flattops, Juniper

(including Great Northern), Parshall, Eagle Divide, Bluestone, Savery-Pot Hook, and a portion of West Divide are based on or will be based on Bureau of Reclamation reconnaissance surveys.

The foregoing, of course, relates only to projects within the purview of the Colorado River Storage Project Act of 1956, as amended, within Colorado. Generally, it is desirable to acquire water rights prior to commencement of feasibility investigations of projects in all Reclamation States.

Sincerely,

Maurice H. Langley

For Ellis L. Armstrong
Commissioner

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
WASHINGTON, D.C. 20240

AUG 10 1967

IN REPLY REFER TO 430

The Colorado River Water Conservation District
P. O. Box 282
Glenwood Springs, Colorado 81601

Gentlemen:

Pursuant to your request, I am forwarding the following data on Reclamation projects with water rights that may be threatened by the opinions of the Supreme Court of Colorado in Four Counties Water Users Association v. Colorado River Water Conservation District, 425 P. 2d 259 and Four Counties Water Users Association v. Middle Park Water Conservation District, 425 P. 2d 262.

Reconnaissance reports have been completed on the following projects:

Project	Expended To Date 6/30/67	Estimated Total Cost
Rabbit Ear	$ 22,128	$ 4,846,600
Troublesome	19,407	5,387,700
Wessels	4,507	2,488,000
Toponas	25,768	7,779,000
Subtotal	71,810	20,501,300
Juniper (Includes the Great Northern Unit)	204,529	169,601,000
Burns	12,284	2,763,000
Hayden Mesa	16,967	11,671,000
Flattops	31,782	62,300,000
Parshall	48,919	12,026,000
Eagle Divide	16,326	3,498,200
Total	$ 330,807	$261,859,200

Feasibility reports either have been or are being prepared on the following projects:

Yellow Jacket	538,561	36,325,000
Grand Mesa	527,790	36,541,000
Battlement Mesa	389,563	16,972,500

Bluestone	356,357	6,818,000
Upper Gunnison	429,309	8,899,000
Basalt	88,758	17,545,000
Dallas Creek	686,214	37,687,000
West Divide	1,010,497	99,800,000
Dolores	891,955	46,643,000
San Miguel	1,007,022	67,815,000
Animas-La Plata	929,150	109,493,000
Total	$6,855,176	$484,538,500

The following projects have been authorized for construction. The first four projects listed have been constructed, Curecanti, Silt, and Bostwick Park are under construction and advance planning preparatory to construction is in progress on Fruitland Mesa and Savery-Pot Hook.

Project	Expenditure To 6/30/67	Total Estimated Cost
Collbran	$ 15,955,376	$ 15,955,376
Florida	11,096,866	11,144,287
Paonia	7,557,389	8,097,377
Smith Fork	4,455,130	4,622,728
Curecanti	68,024,736	97,950,000
Silt	7,089,041	7,657,120
Bostwick Park	1,190,027	5,650,000
Fruitland Mesa	347,140	28,204,000
Savery-Pot Hook	831,151	15,406,000
Total	$116,546,856	$194,686,888

Sincerely yours,

G G Stamm

Assistant Commissioner

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
WASHINGTON, D.C. 20240

IN REPLY
REFER TO 430

OCT 23 1967

Colorado River Water Conservation District
P. O. Box 282
Glenwood Springs, Colorado 81601

Gentlemen:

Supplementing our letter to you of August 10, 1967, we submit the following list of projects with date of decrees:

Project	Date of Entry of Decree
Rabbit Ear	9/5/64)both subject to being amended,
Troublesome	9/5/64(by decision of Colorado Supreme Court, according to Case No. 21566
Wessels	3/30/64)same as above, except according
Toponas	3/30/64(to case No. 21358
Juniper	6/22/62 Subject to being modified by Civil Action 2110, District Court of Moffat County
Burns	9/13/67
Hayden Mesa	None--adjudication pending
Flattops	District 53--9/13/67
	District 43--11/21/66
	District 39--11/10/66
Parshall	5/22/57 Ute Park Res. only.
Eagle Divide	None
Yellow Jacket	District 43--11/21/66
	District 44--none, proof submitted 1/31/64
Grand Mesa	None--adjudication pending.
Battlement Mesa	11/10/66
Bluestone	District 28--12/15/61
Upper Gunnison	District 59--1/27/61
Basalt	6/20/58
	8/3/59
Dallas Creek	4/14/61 Four reservoirs only.
West Divide	District 38--6/20/58
	District 45--7/9/65
	District 40--none

Project	Date of Entry of Decree
Dolores	3/22/63
San Miguel	1/16/67
Animas-LaPlata	3/21/66
Collbran	10/8/62
Florida	3/21/66
Paonia	3/20/54
Smith Fork	1/31/64
Curecanti	District 59--1/27/61
	District 62--3/30/60
Silt	11/10/66
Bostwick Park	3/30/60
Fruitland Mesa	District 40--1/30/64
	District 59--1/27/61
Savery-Pot Hook, Colorado	District 54--6/23/64
	District 55--none.

Sincerely yours,

Maurice N. Langley

Acting Commissioner

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
WASHINGTON, D.C. 20240

JAN 3 1 1968

IN REPLY
REFER TO 710

The Colorado River Water Conservation District
P. O. Box 782
Glenwood Springs, Colorado 81601

Gentlemen:

This supplements our letters to you of August 10 and October 23, 1967, and is in response to your inquiry regarding priority of feasibility investigation of proposed Federal Reclamation projects in your area upon which reconnaissance reports have been completed. As you know, the limitation in funds over the years since the passage of the Colorado River Storage Project Act has not allowed us to proceed on authorizing type investigations as rapidly as originally contemplated. The order of planning of such projects is in accordance with the request of the Colorado Water Conservatio Board.

In the tabulation shown below, we have listed those projects included in our current planning program along with the schedule for the initiation of such studies. The start of the studies in future years, of course, is subject to the availability of funds and such study authorization as may be required.

Project	Initiation of Study (Fiscal Year)
Rabbit Ear	1971
Troublesome	1971
Wessels	1971
Toponas	1971
Juniper (Includes the Great Northern Unit)	1968
Hayden Mesa	1971
Parshall	1971

The Burns, Flattops, and Eagle Divide Projects are not included in our current planning program but consideration will be given to including them therein at the appropriate time and as funds permit.

As our August 10 letter indicates the other participating projects named therein have either been constructed or authorizing type investigations have been completed or are now in progress.

Sincerely yours,

G. G. Stamm

Assistant Commissioner

Appendix F

WILLIAMS, ERICKSON & WALLACE
(PROFESSIONAL CORPORATION)
ATTORNEYS AT LAW
SUITE 1110 CAPITOL LIFE CENTER
DENVER, COLORADO 80203

WAYNE D. WILLIAMS
HOWARD E. ERICKSON
WESTEL B. WALLACE
R. NEIL QUIGLEY

TELEPHONE
222-9424
AREA CODE 303

August 31, 1971

Honorable Don Lorenz
Judge of the District Court
Routt County Courthouse
Steamboat Springs, Colorado

RE: Application of Pittsburgh and Midway Coal Mining Company, etc
Civil Action No. 4000

Dear Judge Lorenz:

In the above matter we are sending you, enclosed herewith, the original and one copy of proposed findings by the Court, and of that portion of your conditional decree which will relate to such findings, on behalf of the following claimants:

Oak Creek Power Company
Yampa-Green Corporation

We also wish to call to the Court's attention the protest which we filed in this proceeding on behalf of Oak Creek Power Company against the claim of Colorado River Water Conservation District for the Hayden Mesa Project. Evidence was taken respecting this claim and our protest on May 28, 1968 before you. The evidence showed very clearly that the Colorado River Water Conservation District was making its claim solely on the basis of surveying and other work preformed by the Bureau of Reclamation (Transcript pages 12-14, and page 25). The Supreme Court of Colorado has held explicitly that such work cannot furnish a basis for a claim of appropriation by the District in the following cases:

Four Counties Water Users Association vs. Colorado River Water Conservation District, 161 Colo. 416, 425 P2d 259 (1967).

Four Counties Water Users Association vs. Middle Park Water Conservancy District, et al. 161 Colo. 429, 425 P2d 262 (1967)

Colorado River Water Conservation District vs. Rocky Mountain Power Company, , Colo. , P2d , (No. 22812 decided April 19, 1971).

Under the circumstances, we do not find any basis in the evidence offered in support of the claim for the Hayden Mesa Project supporting the priority date claimed or any priority date for that project.

Very truly yours,

WILLIAMS, ERICKSON & WALLACE, P.C.

Wayne D. Williams

WDW:mg
Encls.
cc: Kenneth Balcomb, Esq.
P.O. Drawer 790
Glenwood Springs, Colorado